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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 33

IN THE MATTER OF FLORIDA EAST COAST RAILWAY COMPANY,

Debtor,

S. A. LYNCH, et al.,

Petitioners,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY

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IN THE MATTER OF FLORIDA EAST COAST RAILWAY COMPANY,
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ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY

This Court granted a writ of certiorari herein limited to Question I presented by the petition for the writ in No. 34, formerly No. 670. That question is quoted below.

OPINIONS BELOW.

The opinion of the Court of Appeals (II, 717-733[1]) is reported: *In re Florida East Coast Ry. Co.*, 201 F. 2d 325. The opinion in the District Court (I, 127-168) is reported: *In re Florida East Coast Ry. Co.*, 103 F. Supp. 825.

The Commission approved the Plan initially in its Fifth Supplemental Report of July 12, 1951, *Florida East Coast*

[1] In this and similar citations the Roman numerals refer to the volume of the printed record and the Arabic numbers to the page.

Railway Company Reorganization, 282 I. C. C. 81-191, and the Commission modified the Plan slightly, and approved it as modified, in its Sixth Supplemental Report of October 25, 1951, and its Order of the same date, *Florida East Coast Railway Company Reorganization*, 282 I. C. C. 195-226.

• • • • •

An earlier plan, providing for a unification of the Debtor with the Atlantic Coast Line, which was approved in the Commission's Third and Fourth Supplemental Reports, *Florida East Coast Railway Company Reorganization*, 267 I. C. C. 295-391, 267 I. C. C. 729-759,[1] was the subject of an opinion in the District Court (Circuit Judge SIBLEY), *In re Florida East Coast Ry. Co.*, 81 F. Supp. 926, and an appeal, *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538. Atlantic Coast Line Railroad Company, respondent now, petitioned for certiorari, which was denied, *Atlantic Coast Line Railroad Co.* v. *St. Joe Paper Co.*, 339 U. S. 929.[2]

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[1] Photo-lithographed copies of these two Reports will be found in Volume IV of the Record, immediately following a photo-lithographed copy of the Second Supplemental Report.

[2] The Commission first approved a plan on April 6, 1942, *Florida East Coast Railway Company Reorganization*, 252 I. C. C. 423 (VI, 528-640). After consideration of petitions for modifications the plan was modified in certain respects and approved as modified in the Commission's Supplemental Report of August 10, 1942, *Florida East Coast Railway Company Reorganization*, 252 I. C. C. 731 (VI, 641-689). On October 19, 1943 District Judge STRUM sustained objections to the plan and remanded it to the Commission, *In re Florida East Coast Ry. Co.*, 52 F. Supp. 420 (VI, 690-697). After hearings the Commission approved a plan for an "internal reorganization" on January 8, 1945 in its Second Supplemental Report, *Florida East Coast Railway Company Reorganization*, 261 I. C. C. 151-193. (A photo-lithographed copy of the Second Supplemental Report will be found at the front of Volume IV of the record.) After the filing of various petitions for modifications, some of which contained requests for further hearing, the Commission reopened the case (267 I. C. C. 295-296).

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JURISDICTION.

The writ was granted under 28 U. S. C. § 1254.

THE QUESTION PRESENTED.

Question I, to which the Court's consideration was limited by its order granting certiorari, is stated as follows in the petition for a writ in No. 670, now No. 24 (p. 2-3):

"It being clear that Section 77 of the Bankruptcy Act, as enacted in 1933, did not authorize the Interstate Commerce Commission to present a plan of reorganization of a railroad involving a 'forced' merger of the debtor Railway with another railroad, the question is whether amendments to the 1933 Act, made in 1935, do authorize forced mergers.

"The Act of 1933 for railroad reorganizations in bankruptcy contained in subdivision (b) a so called consistency clause which qualified the powers of the Commission in respect of mergers, by expressly providing that a merger would have to be brought about by compliance with '*provisions*' of the Interstate Commerce Act which allowed mergers *only* if requested and agreed to by the carrier and then approved by the Commission, after notice to the Governors of the states, and after hearing communities and shippers served by the carriers. This 'consistency' provision in this legislation was repeated in subd. (e) of the 1933 Act, where it was said that transfers of property or consolidations or mergers may be made 'to the extent contemplated by the plan *consistent with the purposes* of the Interstate Commerce Act as amended'. It will be noted that the clause in (b) used the word 'provisions' and the clause in (e) used the word 'purposes'. By amendments in 1935 these two 'consistency' clauses were consolidated and transplanted from (b) and (e) to subdivision (f).

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"In the 1935 Act, subd. (f), the clause allowing transfer and mergers had the qualification 'to the extent contemplated by the plan' and 'not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935 or thereafter amended.'

"The narrow question is therefore whether the mere transfer of the 'consistency' clauses from subdivisions (b) and (e) of subdivision (f) altered the meaning of the clauses and gave to the Interstate Commerce Commission a power to force mergers, which was withheld from it under the Act of 1933."

The petitioners' disregard of the limitation in this Court's order granting certiorari.

We have the greatest difficulty in discerning any connection between the petitioners' Argument and the question which this Court agreed to review. We shall not on that account wholly disregard the petitioners' brief, but we think we will be justified in passing over some of the things which could not under any possible theory have any bearing whatever on the issue which this Court has undertaken to decide.

Perhaps the reason why the counsel for the petitioners do not argue the proposition on which the petitioners in No. 24 stand, that the Commission has no authority to approve a so-called merger under any circumstances, is because, as we show later, their counsel have consistently maintained that the Commission does have the power to approve a "forced merger". At pages 15-16 we quote a statement made on October 9, 1946 by one of their counsel, whose name appears on their present brief; it is one of the simplest and best statements on the subject we have read. This may explain why the petitioners limit their argument to what they call "an ascertainment as to whether the conditions applicable to the exercise of the power have been met" in this case (p. 6).

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STATUTES INVOLVED.

The statutes involved are Section 77 of the Bankruptcy Act (11 U. S. C. § 205) and Section 5 of the Interstate Commerce Act (49 U. S. C. § 5).

The pertinent portions are set forth in full in Appendix A hereto.

STATEMENT OF THE CASE.

We shall refer briefly to the petitioners' Statement and then review the positions which the petitioners have taken with respect to matters which are germane to the question presented.

Most of the petitioners' assertions with respect to the merits of the Plan before the Court are not only irrelevant to the question presented but unsupported by the record and in direct conflict with explicit findings of the Court of Appeals.

There is much in the petitioners' Statement (p. 5-16) with which we disagree.

For example, it is said that the delay in reorganizing Florida East Coast has been due to the "struggle for control and ultimate ownership of the reorganized company" between St. Joe Paper Company and the respondent (p. 5). There is no mention of the facts that the case was in the courts for thirteen years before the Atlantic Coast Line had anything to do with it at all and that when the Atlantic Coast Line first came into the case at the instance of these petitioners and for years thereafter (as we show below) the St. Joe Paper Company and these petitioners were engaged in battle.

The petitioners say that after the Commission had "proposed its 1945 Plan" the Commission "then received representations from Coast Line that control of the reorganized debtor by St. Joe Paper Company, a holder of a majority of the Refunding Bonds, would not be in the

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public interest" (p. 7). No mention is made of the fact that similar representations were made by the petitioners; some of them are quoted below.

The petitioners say that the present Plan is "substantially identical to the disapproved 1948 Plan" (p. 9). That is not correct. We will not extend this brief by making a comparison of the plans, but will refer to the partial comparison which was made in the petition for certiorari in No. 670 (now No. 24) (p. 12-14) and to Appendix C to the respondent's brief in opposition to the granting of certiorari in No. 670.

The petitioners rely heavily on judicial criticisms of the Commission's performance of its functions. However, the judicial criticisms which the petitioners quote relate to what the Commission did in the years 1945-1948 in connection with the plan which was certified in the District Court in 1948. With respect to the Commission's performance of its functions in 1950-1951 in connection with the present plan, Chief Judge HUTCHESON said (II, 728; 201 F. 2d 329-330):

> "[The record] shows a most careful and painstaking effort on the part of the commission to properly, adequately, and independently value both the securities held by the bondholders and those to be received by them in exchange and that its finding that the plan was fair and equitable finds full support in the evidence.
>
> "Indeed, an examination of all the testimony now available touching on and dealing with the valuations which under the statute it was for the commission to make, demonstrates, we think, beyond any peradventure that the commission's findings and estimates of the respective future earnings of East Coast and Coast Line and of the present and future values of the securities to be given in exchange for each other was most favorable to the bondholders of East Coast.
>
> "The same careful examination shows that but

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> for the fact, which apparently dominates and controls most of the bondholders in this controversy, that they are primarily concerned not with obtaining value received for their securities but with a conversion of their bonds into a title to the East Coast properties, so that they will own and manage the railroad, all of them would be bound to agree that what they will receive for their bonds under the plan will be of a value equal to, or more than, that of their bonds."

The suggestion is made (p. 13) that the Court of Appeals was erroneously influenced by "unfounded assertions by Coast Line" about the Bondholders' Agreement and by the new plan of reorganization to which the Lynch Interests subscribed prior to the hearing in the District Court in 1952. In the respondent's brief in No. 24 we discuss the Bondholders' Agreement, the program for a dismissal of the Section 77 proceeding and the new plan of reorganization (p. 40-43, 145-148). We discuss them there, although they are not within the scope of the question to which certiorari was limited, because the petitioners in No. 24 ask this Court to approve the dismissal of the proceeding and impliedly ask for a blessing on the Bondholders' Agreement and the new plan of reorganization. We will not repeat that discussion here.

However, so far as the Lynch Interests are concerned, there were several extraordinary things about the Bondholders' Agreement, the program for the dismissal of the Section 77 proceeding and the new plan of reorganization.* *First,* as the petitioners note, the plan provides that S. A. Lynch Corporation would have the right to designate two directors (p. 14); this is an extraordinary provision, since under the plan S. A. Lynch Corporation would undoubtedly take bonds rather than stock and bondholders ordinarily do

* For the record about these extraordinary things see pages 40-43 and 145-148 of the respondent's brief in No. 24.

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not elect directors. *Second,* the plan provided for a unique voting trust, the purpose of which must have been to try to obscure the fact that St. Joe Paper Company would control the reorganized company as soon as the plan was consummated. *Third,* no representative of the Lynch Interests, and no representative of the St. Joe Paper Company or any other party to the agreement, went on the witness stand before Judge STRUM in the District Court to tell how the Bondholders' Agreement was reached or to explain the new plan and to permit counsel for the respondent to cross-examine on these matters. *Fourth,* these petitioners took the position, not only in the District Court but in the Court of Appeals, that criticisms of the new plan of reorganization which they had agreed to support as the alternative to the Commission's Plan were "irrelevant" or "premature"—the Courts were asked to *assume* that it was a good plan. All this was pointed out in the Atlantic Coast Line's brief in the Court of Appeals but there were no "unsupported assertions".

The petitioner's Statement contains sweeping self-serving declarations which are refuted by things in the brief. For example, they say (p. 15):

> "From the time of their entry into these proceedings until the present day, the sole motive of the Lynch interests has been that of obtaining fair and equitable treatment for the minority Refunding bondholders. Throughout the history of this case, all plans that have been proposed have been judged by the Lynch interests on the single criterion of whether they were fair and equitable."

However they argue later (p. 29-32) for something *extra* because there is going to be "an enforced merger" (see below, p. 19-23). While they assert (p. 5-6) that they have been hurt by what they call "the struggle for control and ultimate ownership of the reorganized company", they ask for something more (p. 29-32) because of the St. Joe Paper Company's opposition to the Plan.

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The Lynch Interests have repeatedly proclaimed that control by the St. Joe Paper Company would be incompatible with the public interest and with the interests of the minority bondholders.

On the dominant question of law, the power to override any objection of the St. Joe Paper Company to the Plan, the position of the Lynch Interests has been the same as that of the respondent.

In the latter part of 1944 the Lynch Interests proposed a plan of reorganization under which the Atlantic Coast Line would have obtained control of the reorganized company by (1) acquiring 60% of the common stock of the reorganized company for $3,600,000, (2) guaranteeing the interest, but not the principal, of $16,000,000 principal amount of new bonds and (3) entering "into a satisfactory agreement with the reorganized debtor concerning rate divisions and accounting" (261 I. C. C. 188).

In furtherance of that plan S. A. Lynch and others filed a petition, dated December 8, 1944, for reopening of the proceeding to permit the filing of the new proposed plan. In that petition they represented that they had initiated negotiations with the Atlantic Coast Line Railroad Company because they did not believe that the duPont interests could "be depended upon to be railroad-minded and to exercise control of the company and its finances in accordance with the policies consonant with the requirements of normal and sound railroad investment" (p. 5).*

They also said (p. 21, italics in original):

> "The hearing that is sought will afford opportunity to develop this essential factor of public interest. Only as the result of such a full and complete inquiry can this issue be given adequate consideration. It will be shown that the instant plan

* The petition is included in the unprinted portion of the record before this Court (I, 181).

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> for Atlantic Coast Line participation goes far beyond the standard set in Section 5 of the Interstate Commerce Act that the transaction will be 'consistent' with the public interest. It will be shown that in the situation that exists the public interest reasonably *requires* the effectuation of the proposal."

In splendidly clear language the Lynch Interests expounded the proposition that the Commission had the power to approve the proposed plan despite the opposition of the St. Joe Paper Company (referred to by the Lynch Interests as "the duPont interests"), which held a majority in amount of the First and Refunding Mortgage Bonds and was known to be opposed to the new plan. The Lynch Interests said (p. 11-12):*

> "The fundamental question in a railroad reorganization under the bankruptcy power, from both the constitutional and the statutory aspect, is whether, so far as permitted by the capacity of the property to pay out and by the standard of priority

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* They also said (p. 13-14):

> "That the proposal now under special examination comes within the scope of the statutory authority of the Commission (and the Court) is apparent. Subsection (b) of Section 77 provides that a plan of reorganization 'shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control' of the property of the debtor to another corporation, and even 'the merger or consolidation of the debtor with another corporation' and 'may include any other appropriate provisions not inconsistent with this section'.
>
> "Principles closely analogous to those adverted to at earlier places in this chapter invalidate the complaint of the du Pont interests directed to the point that the stock is to be sold at a stated price, and not put up for auction to the highest bidder at a public sale. So long as he is fully compensated and treated equally with others in his class, no bondholder will be heard to complain if the tribunal formulating or approving the plan of reorganization sees fit within that limit to control the disposition of the property or of the securities representing it. To put these securities on the auction block might defeat the public interest embodied in the proposal."

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generally referred to as the principle of the Boyd case, the security owners receive the full equivalent of the securities they are required to surrender. Within that framework of principle, considerations of public interest and of public policy may and should have determining influence.

"It is a matter of no moment from what source or in what form the compensation comes. That is the fundamental doctrine of the *Consolidated Rock Products Case,* 312 U. S. 510, wherein the Supreme Court (Justice Douglas) in connection with a situation different from the instant one in point of fact but we submit not in principle involved, stated:

> If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid.

"The declaration of principle containing the foregoing statement was quoted and applied to railroad reorganizations in *Ecker* v. *Western Pacific R. Corp.,* 318 U. S. 448, 484, and *In Re Missouri Pac. R. Co.,* 39 F. Sup. 436, 447."

While it is true that the Lynch plan, to which the Lynch interests referred in the passages which we have just quoted, did not provide for a merger or consolidation of the Florida East Coast and Atlantic Coast Line, or for a transfer of the assets of the former to the latter, that is immaterial. It provided for an acquisition of control and the provisions of Section 5 (2) and 5 (4) of the Interstate Commerce Act apply to acquisitions of control as well as to mergers, consolidations and transfers of assets (Appendix A, p. v-viii). If there could be "force" in one case there could be "force" in another; if "force" is barred in one case, then it is barred in all. The principles which the Lynich interests then enunciated are sound.

On January 8, 1945 the Commission denied the petition of the Lynch Interests (261 I. C. C. 187-193) and approved an internal plan of reorganization in its Second Supplemental Report (261 I. C. C. 151-193).

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Within the statutory period of 60 days from the Second Supplemental Report the Lynch Interests and others filed petitions for modifications of the plan approved in that report and requests for further hearings. The petition of the Lynch Interests, dated March 9, 1945, said among other things (p. 40):*

> "Petitioners believe that if given the opportunity that only a hearing can provide they can convince the Commission that the A. C. L. plan better serves both the interest of the public and the proper investment interest of the holders of the First and Refundings than the plan recently approved by the Commission.
>
> "This is a case 'when the public interest, as distinguished from private, bulks large in the problem'. It presents the question whether it is more in the public interest that the Debtor should continue to be operated as an independent company or should be unified with a strong trunk-line connection with which it has been closely linked for many years. The Commission, by refusing to reopen the case, has refused to consider the question."

The Commission reopened the case and extended hearings were held in November, 1945 before two Examiners (267 I. C. C. 296-297). Briefs were then filed dated February 15, 1946. The brief of the Lynch Interests was particularly vigorous in saying that control of an internally reorganized company by the St. Joe Paper Company would not be "compatible with the public interest"** (p. 69, 76-77):

> "Throughout this proceeding, the position of St. Joe Paper Company has been one of expediency based on the amount of bonds owned at any given

* This petition is included in the unprinted portion of the record (I, 181).

** This brief is included in the unprinted portions of the record (I, 184).

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time in relation to its ultimate goal of control of the reorganized company. Its proposals for a capital structure, for the character of the securities to be issued and for the treatment of the Refunding bondholders have vacillated from time to time, not in relation to earning forecasts and similar standards but in relation to what was expedient to assure control for St. Joe Paper Company. That approach has been uniform and continues at present."

* * * * *

"As already pointed out, St. Joe Paper Company is, in effect, an instrument of the du Pont estate, which has many substantial interests in the State of Florida, occupying a major place in the financial and economic life of the State.

"The record contains ample evidence of these extensive interests in Florida banks, real estate, hotels, office buildings and other businesses. For example, according to Mr. Ball the du Pont estate owns or controls 17 or more banks located in the State of Florida, the deposits of which exceed the total deposits in all banks in Florida at the bottom of the depression (Tr. 3555).

"Without attempting to summarize the vast extent of the du Pont economic and financial interests in Florida, it is evident that the trustees of the estate are in a position to exert tremendous influence and wield immense power, not only in private financial and industrial circles but likewise in matters relating to state and local governmental finances. Under these circumstances it is plain that the primary interest of the du Pont estate cannot be confined to controlling the reorganized company. Moreover, even though the trustees of the du Pont estate desired to devote their major attention to operation of the reorganized company, the opportunity would nevertheless exist in the exercise of that control for purposes not necessarily related to the welfare of investors in the company or necessarily consistent with sound investment standards. * * *"

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Examiner R. H. Jewell then filed a proposed report recommending an internal plan of reorganization with St. Joe Paper Company control (VI, 734-848). In their exceptions to the proposed report and supporting brief dated August 20, 1946, the Lynch Interests took a particularly strong line in opposition to St. Joe Paper Company control (p. 6-7). The following is a reproduction of a part of their brief (p. 6-7).*

> **"The Examiner failed to take into account the unusual circumstances of this case, where a powerful commercial, industrial and financial interest seeks to dominate an interstate carrier in complete disregard of the rights of other bondholders, thus requiring special scrutiny on the part of the Commission and more than ordinary safeguards for the rights of other bondholders in the capitalization, type, amount and character of new securities and other protective provisions.**
>
> ***"The Fundamental Problem Presented by this Case***
>
> "The Examiner failed to give appropriate consideration to the unusual circumstances of this case which require protective provisions not ordinarily contained in plans of reorganization. This necessitates a restatement of the unusual features of this proceeding.
>
> "The outstanding and predominant characteristic of this proceeding has been the persistent effort of the Alfred I. du Pont Estate, directly or through its instrumentalities, to obtain control of the Debtor upon its reorganization in such fashion as completely to dominate its future, without regard to other Refunding bondholders. Wholly without regard for the changed financial condition of the Debtor or of the property rights of the minority interests, the du

* This is included in the unprinted portions of the record before this Court (I, 186).

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Pont Estate or St. Joe Paper Company has from time to time made varying proposals for a reorganization that have been designed solely to assure unqualified control after reorganization. In this effort, it has from time to time, as expediency required, changed its position as to the proper capitalization.

"This effort of the instrumentality of a vast industrial and financial empire to seize control of a major carrier essential to the welfare of the State of Florida, in complete disregard of the rights of the minority interests, influences all other questions in this proceeding. The ingenious and constantly shifting efforts of the du Pont Estate are indicative of its ultimate purpose to acquire domination of the carrier.

"It is unnecessary here to remind the Commission of the important public aspects of this case. The public policy, as evidenced by acts of Congress, is well established as to the desirability or lack of desirability of the unfettered control of an important carrier by great industrial and commercial enterprises. Nor does the Commission need to be reminded of the consequences that may follow where important industrial and commercial enterprises, closely affiliated with powerful commercial banking interests that are in a position to exert great influence on other enterprises, seek to control an important carrier."

In their brief of August 20, 1946 the Lynch Interests also repeated verbatim (p. 68-69) what they had said at pages 76-77 of their brief of February 15, 1946, as quoted above.

After the filing of exceptions to Examiner Jewell's proposed report there was an argument before the full Commission on October 9-10, 1946. Counsel for the Lynch Interests then said in part (Tr. 4608-4609):*

* The transcript of this argument is included in the unprinted portions of the record before this Court (I, 187).

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"I have one comment to make, however, that the Commission's power to require a merger is not dependent upon the wishes of the majority. To me that is an unusual statement to be made in opposition to power. The Commission's power depends on the statutory power which it gives it, under Section 77.

"If we are going to adapt reorganization plans to suit the wishes of the majority, then all of your hearings, these long and expensive hearings are useless.

"You would just as well in the first instance take a vote of the bondholders as to which plan or which program is acceptable, and abide by the results.

"It seems to me that a position of that kind, if adopted, would nullify the whole purpose of Section 77."

In the light of these quotations, let us consider the present position of the Lynch Interests. The principal petitioners, the St. Joe Paper Company and the duPont Trustees, now seek two things:

A holding that the Commission's Plan provides for an unlawful "forced merger"; and

A dismissal of the proceeding with a blessing for the alternative equity plan under which there would be St. Joe Paper Company control.*

Certainly the quotations we have given establish that for years the Lynch Interests continuously maintained positions, as to St. Joe Paper Company control and the power to override the wishes of the St. Joe Paper Company, which are diametrically the opposite of the positions now adopted by the St. Joe Paper Company and the duPont Trustees in No. 24.

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* For a fuller discussion of the alternative equity plan, see the respondent's brief in No. 24.

SUMMARY OF THE ARGUMENT.

1. The petitioners' argument is clearly outside the scope of the question which this Court undertook to review.

2. The petitioners' arguments about unification savings are plainly untenable.

3. The petitioners' argument based on what was said in the *Old Colony* case is also plainly without merit.

ARGUMENT.

I.

THE PETITIONERS' ENTIRE ARGUMENT IS CLEARLY OUTSIDE THE SCOPE OF THE QUESTION WHICH THIS COURT UNDERTOOK TO REVIEW.

This Court granted certiorari with respect to Question I in No. 670 (now No. 24). At pages 3-4 above we have quoted Question I as it appears at pages 2-3 of the petition for certiorari in No. 670 under the heading "Questions Presented".

The petitioners seem to think there is some uncertainty about the effect of the order granting the writ because one of the specifications of errors in the petition for a writ in No. 670, differed in wording from the statement of Question I (petitioners' brief, p. 17). However, the broadest language used in the petition for a writ in No. 670 related to the Commission's "power to propose and certify *a plan* of reorganization involving a consolidation or merger of the Florida East Coast Railway Company with Atlantic Coast Line, to which Florida East Coast Railway had not agreed". The petitioners now say that the "question for consideration by this Court is whether the Interstate Commerce Commission had the power to promulgate under Section 77 of the Bankruptcy Act *the pending plan* that provides for a compulsory merger of the debtor with an entirely separate railroad".

The words that we have italicized show that the petitioners seek to broaden the question so that it covers not the power to approve *a plan* over the St. Joe Paper Company's opposition but the power to approve *the particular Plan* which the Commission did approve. Having thus tried to broaden the question, the petitioners proceed to argue two points involving the amounts of cash and Atlantic Coast Line securities which they think the bondholders should receive. This would seem to involve the plainest disregard of this Court's order granting certiorari.

II.

THE PETITIONERS' ARGUMENTS ABOUT UNIFICATION SAVINGS ARE PLAINLY UNTENABLE.

There never has been any dispute about the proposition that the Commission should give due consideration to unification savings in determining the terms of the Plan and it is quite unnecessary to consider whether this Court's decision in *Schwabacher* v. *United States* (1948) 334 U. S. 182, has any bearing on that point.

As the petitioners' brief shows, the Commission made a careful estimate of the unification savings and stated explicitly that it recognized that they should be taken into account in determining what the Atlantic Coast Line should pay in cash and securities and what the Florida East Coast bondholders should receive. Furthermore, the Commission said that it had taken the unification savings into account. The petitioners' complaint is the same one which they made in the District Court and the Court of Appeals: they say that the Commission did not take the unification savings into account adequately. The basic fallacy in the petitioners' arguments is that they treat the par or stated value of securities as decisive and wholly disregard the real worth or true value which depends upon the attributes or "quality" of the securities (282 I. C. C. 203-204).

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III.

THE PETITIONERS' ARGUMENT BASED ON WHAT WAS SAID IN THE *OLD COLONY* CASE IS ALSO PLAINLY WITHOUT MERIT.

The petitioners say (p. 32):

> "Throughout the phase of the instant proceeding where purchase by Coast Line has been involved, the Commission has acted as though it were dealing with two segments of the same system rather than with two entirely separate and distinct entities, having no present corporate relationship to each other. In other words, the Commission has assumed the same authority and applied the same standards as though there were involved only the customary Section 77 reorganization with a system integration and merger of subsidiary companies."

They contend that the Commission erred in this respect and quote from *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.* (C. C. A. 2d, 1947), 161 F. 2d 413, cert. den. sub nom. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.* (1947) 331 U. S. 858, rehearing denied (1947) 332 U. S. 803. However, the petitioners' quotation on pages 30-31 from the *Old Colony* opinion leaves out some significant sentences, the omission of which is indicated by asterisks. The paragraph from which the petitioners have quoted reads in its entirety as follows (p. 420-421):

> "Even on the assumption that the law is as we have stated it, the appellant raises a number of objections to the Commission's appraisal. The first is that the finality of an appraisal by the Commission is limited to a true reorganization, that is, to one where the property for which the new securities are to be issued belongs to the debtor. Since in the case at bar the plan contemplates a sale of Old Colony assets to the reorganized New Haven, the appellant argues that the Commission could not

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lawfully proceed as it did, but must follow the doctrine applied in First Nat. Bank v. Flershem, 290 U. S. 504, 527, 54 S. Ct. 298, 307, 78 L. Ed. 465, 90 A. L. R. 391, under which 'A detailed appraisal must * * * be made of the corporation's assets as of the date of the sale, based upon then values and the possibility of disposing of them in parcels, as well as an entirety.' Again, '* * * a detailed valuation of the many items * * * was essential to intelligent bidding for the property in such parcels or as scrap.' It is true that if the transfer of Old Colony assets is like a judicial sale on foreclosure or execution, the Commission's appraisal was not valid. But we think it is not. The purpose of the kind of appraisal required in the Flershem case is to protect those creditors who do not choose to to come in; it is to provide an honest 'upset price.' The same procedure is not required under section 77, for the reason that if minority creditors are not content with the plan, the court, under the 'cram down' provisions added in 1935, 49 Stat. 919, can force them in; and if it does not, must reject the plan. Hence nothing should turn upon the fact that deeds of conveyance must be executed and exchanged for new securities, or that these transactions are described in terms appropriate to a sale. The 'transfer' is as much a part of a true reorganization as if the title to the assets had been in New Haven. The statute itself so treats such a transaction, for section 77, sub. a, allows a subsidiary railroad corporation, such as Old Colony, to file a petition stating that 'it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of' the principal debtor. The plan now under consideration adopted the second alternative because the Commission determined that integration of the two railroads is required in the interests of the public. In such a situation we cannot understand how it can make the slightest difference, so far as concerns the appraisal of property, that there must be deeds to effect the transfer of the subsidiary's assets and that the new securities, the release of the

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principal debtor's prior lien claim against the subsidiary and the payment by the principal debtor of the subsidiary's reorganization expenses are treated as constituting the 'price.' We agree with appellee's argument that the properties of the Old Colony are, for purposes of the plan, on the same footing with respect to the whole system as are lines securing a divisional mortgage of New Haven. In the St. Paul case, 318 U. S. 523, 63 S. Ct. 727, 87 L. Ed. 959, it was held that bondholders whose claims were secured upon part of a single railroad—a division—were not entitled to a separate appraisal. Yet the transaction by which their lien was wiped out and they were given new securities is as much a 'transfer' for a 'price' and therefore a 'sale' as is the proposed extinguishment of the lien of Old Colony bondholders in exchange for new securities."

The *Flershem* case related to the fixing of upset prices n foreclosure sales. In the *Old Colony* case it was con-ended that under the New Haven plan there would be a ale of the Old Colony's assets to the reorganized New Haven and that therefore the price had to be fixed in the nanner in which an upset price would be fixed under the *'lershem* case. Judge SWAN, for the Circuit Court of ppeals, disposed of this contention by saying that the ransfer of the Old Colony's assets would not be like a judicial sale and foreclosure execution".

In railroad reorganizations there can be at least four ypes of transfers:

(1) A transfer of the property of the debtor to a new company where all of the debtor's property is covered by a single mortgage and there are no other debtors;

(2) A transfer of the property subject to a divisional mortgage (that is, a mortgage on a line of railroad owned by a debtor which is only a segment of a railroad which the debtor owns);

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(3) A transfer of the properties of a subsidiary debtor to the principal debtor as reorganized; and

(4) A transfer of the properties of the debtor to a railroad corporation which is not a debtor, as in this case.

Judge SWAN's opinion said that the transfers of type (2) and type (3) are not "like a judicial sale on foreclosure or execution" and that the *Flershem* case did not apply to a transfer of the Old Colony's assets, which was a type (3) transfer. The Judge did *not* say that a transfer of type (4) would be like a judicial sale on foreclosure or execution and that therefore the *Flershem* case would apply; if he had said so, the statement would have been *dictum*. True, he said some things about the Old Colony-New Haven transfer which would not apply to a Florida East Coast-Atlantic Coast Line transfer, but that is of no significance.

It is perfectly clear that a transfer of the assets of the Florida East Coast to the Atlantic Coast Line under the Plan will not be "like a judicial sale on foreclosure or execution". It would be just as dissimilar from "a judicial sale on foreclosure sale or execution" as the Old Colony-New Haven transfer.

The petitioners say (p. 32):

> "As a matter of business judgment, it is evident that an enforced merger of two strangers involves quite different problems from those involved in a consolidation of the constituent members of an existing system."

This is plainly fallacious. In the first place, when the Commission decides upon the terms of a merger it usually does not know whether the merger is going to have to be "enforced" or not. The petitioners repeatedly insist that all they have wanted is to receive "fair and equitable" treatment, but in their argument based on the *Old Colony* case they demand something more on the

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ground that the merger is going to have to be "enforced". In the second place, there is no reason why as a matter of business judgment it should make any difference whether two companies are already "constituent members of an existing system". Indeed, the petitioners' brief presents a striking contradiction: at pages 20-21, in arguing about Section 5 of the Interstate Commerce Act, the consistency clause of Section 77 (b) and the *Schwabacher* case, they insist, in substance, that "fair and equitable" terms for a merger plan under Section 77 are the same as "just and reasonable" terms for a merger under Section 5. The requirements of Section 5 for the terms of a merger to be "just and reasonable" apply to *all* parties to the merger. The Commission in this case could not approve a plan which was unjust and unreasonable so far as the Atlantic Coast Line was concerned. Yet the petitioners argue that the Florida East Coast bondholders should receive, and the Atlantic Coast Line should give up, something more because this merger must be "enforced".

CONCLUSION.

The order of the Court of Appeals should be affirmed.

Dated, October 6, 1953

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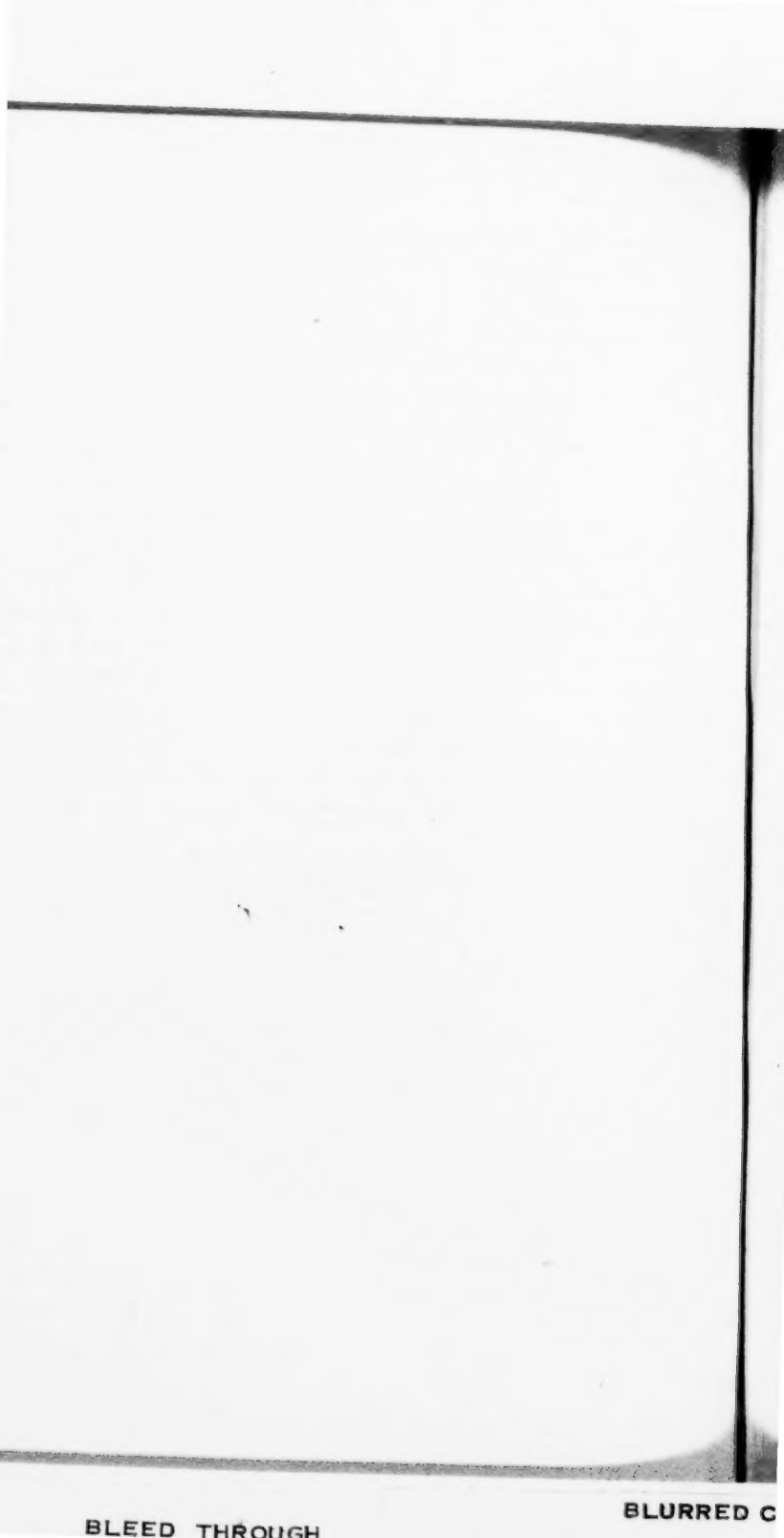

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Appendix A

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THE STATUTES

Attributes of a Plan of Reorganization.

SECTION 77(b)—first paragraph in full.[1]

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations,* the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not

[1] The text of all Section 77 provisions is taken from 11 U. S. C. A. § 205. Italics are supplied.

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less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; *and may include any other appropriate provisions not inconsistent with this section.*

Approval of a Plan by the Commission.

SECTION 77(d)—first paragraph in part.

* * * the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

Approval of a Plan by the Court.

SECTION 77(e)—first paragraph and first sentence of second paragraph.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties

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in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor,

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and he shall enter an order in which he may either dismiss the proceedings or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received.

Confirmation of a Plan—the "Cram-down" Provision.

SECTION 77(e)—third paragraph in part.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interest or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* * * *.

The So-Called "Consistency Clause".

SECTION 77(f)—fifth sentence

Upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of

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any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and *not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.*

Section 5 of the Interstate Commerce Act—Pertinent Provisions.[1]

UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

(2) (a) *It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—*

(i) *for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier,* or two or more carriers jointly, *to purchase,* lease, or contract to operate *the properties,* or any part thereof, *of another;* or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) *Whenever a transaction is proposed under subparagraph (a), the carrier* or carriers or person *seeking*

[1] The text is taken from 49 U. S. C. A. § 5. Italics are supplied.

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authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e)), *and shall afford reasonable opportunity for interested parties to be heard.* If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1)

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the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commisson that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order

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such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

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CONTROL EFFECTED BY OTHER THAN PRESCRIBED METHODS

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

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PLENARY NATURE OF AUTHORITY UNDER SECTION

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modication of its powers under its corporate charter or under the laws of any State.

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